

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION**

EARTHKIND, LLC,

Plaintiff,

v.

**THE LEBERMUTH COMPANY INC.
and ROBERT M. BROWN,**

Defendants.

Civil Action No. 5:19-cv-51

COMPLAINT

Plaintiff EarthKind, LLC complains of Defendants The Lebermuth Company Inc. (“Lebermuth”) and Robert M. Brown and alleges the following:

NATURE OF THE CASE

1. EarthKind is a pest control developer, manufacturer, and supplier that specializes in creating natural, plant-based alternatives for pest prevention
2. Over the course of a decade, Lebermuth supplied “fresh cab oil” pest repellant to Earthkind, LLC (together with its predecessors, EarthKind, Inc. and Crane Creek Gardens, “EarthKind”). This fresh cab oil was required to comply with the Confidential Statements of Formula (the “CSFs”) submitted to the Environmental Protection Agency (“EPA”) in 2006 and signed by Lebermuth.
3. Lebermuth repeatedly represented and warranted that the fresh cab oil it was supplying complied with the CSFs, including representations and warranties accompanying each shipment of fresh cab oil and numerous oral representations to EarthKind’s CEO by Lebermuth’s CEO, Mr. Brown.

4. EarthKind subsequently discovered that the fresh cab oil it received from Lebermuth did not comply with the CSFs and that Defendants intentionally deviated from the CSFs in Lebermuth's production of fresh cab oil.

5. Worse still, when EarthKind began to uncover potential discrepancies in the fresh cab oil and the CSFs, Defendants attempted to conceal Lebermuth's non-compliance. Mr. Brown first represented that the issue was with Lebermuth's formula documents, not the formula itself. Lebermuth then provided different formula documents that matched the CSFs, but these formula documents were exposed as false, as they did not match the formula of the actual fresh cab oil that Lebermuth was supplying. Faced with this irrefutable evidence, Mr. Brown finally admitted that the formula Lebermuth had been using for the fresh cab oil did not comply with the CSFs, and he then contended that the CSF formula "would not work."

6. Lebermuth not only breached its contractual obligations and warranties, but it and its CEO, Mr. Brown, perpetrated a fraudulent scheme in which they concealed, through deliberate misrepresentations and false documents, Lebermuth's non-compliance with the CSFs in order to preserve the lucrative business Lebermuth was receiving from EarthKind.

7. EarthKind brings this action to recover the substantial damages it has incurred due to Defendants' actions, including losses from being forced to halt production and sale of its products for ten months, losses from purchasing non-compliant and unusable inventory, regulatory costs, and diminution in value of the company and lost equity.

PARTIES

8. EarthKind, LLC is a Delaware limited liability company with its principal place of business in Bismarck, North Dakota. EarthKind, LLC is registered to transact business in the state of North Carolina and maintains a manufacturing facility and place of business at 346-D East Plaza

Drive, Mooresville, North Carolina 28115 (the “Mooresville Facility”). EarthKind, LLC was formed in September 2017 through the conversion of EarthKind, Inc., a North Dakota corporation, into a Delaware limited liability company.

9. Lebermuth is an Indiana corporation with its principal place of business in South Bend, Indiana. Lebermuth holds itself out as a supplier of natural and organic essential oils.

10. Mr. Brown is the CEO of Lebermuth. Upon information and belief, Mr. Brown is a resident of St. Joseph County, Indiana.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because the matter in controversy between EarthKind and Defendants exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.

12. This Court has personal jurisdiction over Defendants consistent with the principles underlying the U.S. Constitution and N.C. Gen. Stat. § 1-75.4. This action arises out of Lebermuth’s promise to deliver goods and delivery of goods within the state of North Carolina. *See* N.C. Gen. Stat. § 1-75.4(5)(c). Defendants have done continuous and systematic business in the state. *See* N.C. Gen. Stat. § 1-75.4(1)(d). Additionally, this action claims injury to EarthKind within the state of North Carolina arising out of Defendants’ acts and omissions, including acts and representations directed at North Carolina, and at the time of EarthKind’s injury, products processed, serviced, or manufactured by Lebermuth were used or consumed within North Carolina in the ordinary course of trade. *See id.* §§ 1-75.4(3), (4)(b).

13. Venue is proper in this Court under the provisions of 28 U.S.C. § 1391(b). A substantial part of the events giving rise to EarthKind’s claims occurred in this district and division, and Defendants are subject to personal jurisdiction in this district.

FACTUAL BACKGROUND

14. EarthKind's CEO, Kari Warberg Block, founded EarthKind after conceiving of a method to safely and naturally deter rodents from indoor and other enclosed areas using scents offensive to rodents. To implement this method, EarthKind developed a product known as Fresh Cab®, which includes fresh cab oil and which EarthKind intended to market for sale to residential and commercial customers.

15. In 2005, EarthKind requested that Lebermuth assist it in developing a formula for fresh cab oil that contained a specific percentage of the oil's active ingredient, as well as other inert ingredients to achieve a desired fragrance. Lebermuth was to produce and supply fresh cab oil exclusively to EarthKind.

16. EarthKind sent two of its contractors, Dr. Jan Ollinger and Dr. Karen Pither, to work with Mr. Brown over a period of several days to develop the fresh cab oil formula. Dr. Ollinger and Dr. Pither continued to communicate with Mr. Brown by email over the following months to finalize the formula.

17. After developing the formula with Lebermuth, EarthKind had it tested by a laboratory, Genesis Labs, which produced a sample of the fresh cab oil.

EPA Registration

18. EarthKind's products at issue in this matter are required to be, and are in fact, registered with the EPA as pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*

19. To register a pesticide under FIFRA, a registrant must submit an application including, among other things, a CSF listing the identities and amounts of the active and inert ingredients in the pesticide.

20. Under FIFRA, it is unlawful for any person to sell or distribute a registered pesticide that differs in composition from the composition in the CSFs supporting the application for registration approved by the EPA.

21. In February 2006, EarthKind submitted an application for registration of fresh cab oil to the EPA. The EPA registration documents often refer to the fresh cab oil as “Canadian Wilderness Oil” (the manufacturing use product) and “Fresh Cab” (the end use product).

22. In support of that application, two CSFs for two alternative formulations of fresh cab oil were submitted.

23. Mr. Brown signed the CSFs on Lebermuth’s behalf.

24. EarthKind registered two formulas for fresh cab oil with the EPA to provide Lebermuth with the flexibility to substitute certain inert fragrance oils in the event it did not have the fragrances in the primary formula in stock at a given point in time.

25. EarthKind completed the EPA registration process in April 2007 and thereafter began marketing Fresh Cab® with Lebermuth as its exclusive supplier.

Lebermuth Supplies Fresh Cab Oil to EarthKind

26. Following the registration of the CSFs, EarthKind requested, and Lebermuth developed, a private item code (CC-3208-01) to refer to the product that is set forth in the CSFs. EarthKind and Lebermuth agreed and understood that item code CC-3208-01 referred to fresh cab oil that complied with the CSFs.

27. The parties’ contractual relationship was set forth in a series of purchase orders EarthKind placed with Lebermuth and invoices that Lebermuth sent to EarthKind with its shipments of fresh cab oil. Each purchase order and invoice includes item code CC-3208-01.

28. Each of Lebermuth's invoices was accompanied by a Certificate of Analysis ("COA") setting forth the odor and physical characteristics of each lot number of fresh cab oil that was shipped. The COAs also include item code CC-3208-01.

29. From 2007 through Lebermuth's last shipment of fresh cab oil in 2017, the odor and physical characteristics set forth in each of the COAs Lebermuth provided to EarthKind and the item code on each of the COAs purported to show a product consistent with the 2006 CSFs. By its documents, Lebermuth represented that to be the case.

30. Beginning in 2014, when EarthKind opened the Mooresville Facility, Lebermuth shipped the fresh cab oil it produced for EarthKind directly to Mooresville, North Carolina.

31. At the Mooresville Facility, and its North Dakota headquarters and Faribault, Minnesota facility prior to the opening of the Mooresville Facility, EarthKind used the fresh cab oil supplied by Lebermuth to manufacture its Fresh Cab® products.

Defendants' Further Representations to EarthKind

32. Lebermuth continued to utilize the same CC-3208-01 item code on its invoices, which it had developed to refer to CSF-compliant fresh cab oil.

33. Ms. Warberg Block also asked Mr. Brown on numerous occasions from 2007 through early 2017 to confirm that Lebermuth was continuing to utilize one of the formulas set forth in the CSFs.

34. On each occasion, Mr. Brown assured Ms. Warberg Block that the fresh cab oil Lebermuth was supplying to EarthKind complied with the CSFs.

35. Mr. Brown made these representations to Ms. Warberg Block in North Dakota and in North Carolina.

36. From 2014 onward, Mr. Brown was aware that Lebermuth was producing and shipping fresh cab oil to EarthKind in North Carolina for use by the Mooresville Facility.

37. Mr. Brown regularly spoke to EarthKind's purchasing department in Mooresville, North Carolina about the products Lebermuth was supplying, and EarthKind regularly sent correspondence from North Carolina to Mr. Brown regarding products Lebermuth was supplying.

38. Mr. Brown made these representations with the intent of inducing EarthKind to place further orders with Lebermuth for fresh cab oil to be shipped to the Mooresville Facility.

EarthKind's Discovery of Discrepancies and Defendants' Cover-Up of Their Conduct

39. In 2015, EarthKind retained an entomologist and regulatory consultant, Dr. Janet Kintz-Early, to assist EarthKind with its regulatory compliance and registering additional products.

40. In connection with Dr. Kintz-Early's work, EarthKind requested the fresh cab oil formula documents from Lebermuth in 2016, and Lebermuth provided the formula documents.

41. Upon receipt of the formula documents from Lebermuth, Dr. Kintz-Early determined that the ingredients listed did not match those in the CSFs.

42. In October 2016, Ms. Warberg Block raised the discrepancies between Lebermuth's formula documents and the CSFs to Mr. Brown. Mr. Brown represented to Ms. Warberg Block that the issue was with Lebermuth's formula documents, not the formula itself, and that he would provide her with correct formula documents.

43. Mr. Brown also suggested that they discuss the matter further during an in-person visit by EarthKind personnel to Lebermuth's headquarters in South Bend, Indiana.

44. In March 2017, Lebermuth's Regulatory Affairs/Compliance Manager, Geoff Davis, finally sent EarthKind new formula documents for the fresh cab oil Lebermuth was supplying. These new formula documents contained at least seven additional ingredients from the

formula documents provided by Lebermuth in 2016, and the new formula documents still did not match the CSFs. Mr. Davis confirmed to EarthKind and Dr. Kintz-Early that the new formula documents were correct – that they matched the fresh cab oil Lebermuth was supplying.

45. EarthKind's visit to Lebermuth took place on April 26, 2017. Dr. Kintz-Early traveled with EarthKind's Director of Manufacturing, Kevin Pierce, to Lebermuth's facility in South Bend, Indiana.

46. The morning of Dr. Kintz-Early and Mr. Pierce's visit, Mr. Davis emailed Dr. Kintz-Early another set of formula documents for the fresh cab oil.

47. At that point, Lebermuth had provided EarthKind with multiple sets of conflicting formula documents.

48. Mr. Davis informed Dr. Kintz-Early during their meeting that his email contained the correct formula for the fresh cab oil that Lebermuth had been and currently was manufacturing and that it complied with the CSFs.

49. Following the visit to Lebermuth, Mr. Brown again assured Ms. Warberg Block on a telephone call that the formula being utilized by Lebermuth complied with the CSFs.

50. Neither Dr. Kintz-Early nor Mr. Pierce knew of inaccuracies in Lebermuth's representations at or after the April 26, 2017 meeting. Subsequent to Dr. Kintz-Early's return, on or around May 2, 2017, Ms. Warberg Block met with Dr. Kintz-Early to examine the new formula documents provided by Lebermuth.

51. After comparing and analyzing the documents and the CSFs, EarthKind concluded that Lebermuth's formula provided on April 26, 2017, not only contained incorrect inert ingredients, but also had substituted four active ingredients for the one active ingredient listed in the CSFs.

52. Ms. Warberg Block became suspicious given Mr. Brown's repeated representations regarding Lebermuth's CSF compliance and contacted Lebermuth's head of Fragrance to request another copy of the fresh cab oil formula. Ms. Warberg Block instructed Dr. Kintz-Early to contact a different Lebermuth employee with the same request, which Dr. Kintz-Early did.

53. Both sets of formula documents Ms. Warberg Block and Dr. Kintz-Early received in response to their inquiries differed from those provided by Mr. Davis on April 26, 2017; however, the sets of formula documents still did not comply with the CSFs.

54. On or around May 6, 2017, Ms. Warberg Block spoke with Mr. Brown by phone and confronted him again regarding the discrepancies between Lebermuth's formula documents and the CSFs.

55. Faced with this evidence of Lebermuth's noncompliance, Mr. Brown finally confirmed during that call that the formula Lebermuth had been using did not match the CSFs and further stated that he was not sure if it ever had.

56. Ms. Warberg Block informed Mr. Brown that she intended to notify the EPA and that EarthKind would not accept any further deliveries of fresh cab oil.

57. On or around May 7, 2017, Ms. Warberg Block and Dr. Kintz-Early again spoke with Mr. Brown.

58. During that call, Mr. Brown attempted to justify Lebermuth's misconduct by asserting for the first time that the formula set forth in the CSFs "would not work" and that Lebermuth's noncompliant formula would actually be effective.

59. The following week, Mr. Brown again acknowledged that the fresh cab oil Lebermuth had been supplying did not match the CSFs and advised EarthKind to avoid disclosing the discrepancies to the EPA or to its customers, so as not to disrupt the business. Mr. Brown

further proposed that Lebermuth and EarthKind attempt to register the formula Lebermuth had been using with the EPA.

60. EarthKind did not place any new orders for fresh cab oil from Lebermuth following May 6, 2017, and rejected an order that had already been shipped.

61. EarthKind also confirmed through laboratory testing that the fresh cab oil provided by Lebermuth did not match the CSFs.

EarthKind's Damages

62. EarthKind acted promptly to mitigate damages from Lebermuth's noncompliance with the CSFs, including mitigating its potential liability under FIFRA Section 12(a)(1)(C) (7 U.S.C. § 136j(a)(1)(C)); Section 12(a)(2)(O) (7 U.S.C. § 136j(a)(2)(O)); Section 12(a)(2)(S) (7 U.S.C. § 136j(a)(2)(S)); and the EPA's regulations at 40 C.F.R. § 152.44(a).

63. On May 25, 2017, EarthKind submitted a notice to the EPA of the noncompliance in accordance with the EPA's Audit Policy 65 Fed. Reg. 19,618 (April 2000), formally titled "Incentives for Self- Policing: Discovery, Disclosure, Correction and Prevention of Violations."

64. In addition, EarthKind halted production and ceased selling products that were in violation of FIFRA while it worked to identify a new supplier and to submit a new fresh cab oil formula to the EPA for approval.

65. EarthKind submitted an amendment to its pesticide application to the EPA, including new CSFs, on July 24, 2017.

66. The EPA approved EarthKind's amendment on December 22, 2017.

67. EarthKind was unable to produce and sell Fresh Cab® from May 2017 until January 2018.

68. The lapse in EarthKind's production of Fresh Cab® while it awaited EPA approval of a new supplier for EarthKind's Fresh Cab® formula occurred at a time when demand for EarthKind's products was high, and the lapse cost EarthKind substantial profits and goodwill.

69. EarthKind also incurred significant production-related costs at the Mooresville Facility. Those costs included the value of fresh cab oil inventory EarthKind had on hand at the time but could no longer use and the cost of outdated packaging for EarthKind's products that EarthKind was forced to destroy.

70. EarthKind sustained other damages, including regulatory fees associated with its self-disclosure and submission of a new CSF to the EPA, the costs to replace Fresh Cab® marketing materials and to maintain customer relationships during the production downtime, and diminution in value of the company and lost equity.

COUNT I
Breach of Contract against Lebermuth

71. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

72. A valid and enforceable contract was formed each time EarthKind submitted a purchase order to Lebermuth for fresh cab oil and Lebermuth shipped the oil to EarthKind along with an accompanying invoice.

73. An express or implied term of those contracts was that Lebermuth was supplying to EarthKind fresh cab oil that complied with applicable law, including compliance with the CSFs, as indicated by item code CC-3208-01. The parties understood that, under the contracts, Lebermuth was to supply fresh cab oil that complied with the CSFs.

74. The contracts also incorporated the COAs, which set forth odor and physical characteristics that corresponded to a product consistent with the CSFs.

75. Lebermuth and EarthKind entered into contracts for the supply of fresh cab oil approximately monthly from 2007 through April 2017.

76. Lebermuth materially breached the terms of some or all of the parties' contracts by supplying EarthKind with a different product from the product for which they bargained – fresh cab oil that was compliant with the CSFs.

77. As a result of Lebermuth's breaches, EarthKind has suffered substantial damages, including without limitation losses arising from being forced to halt production of its products for ten months, having purchased non-compliant and unusable inventory, incurring regulatory costs, and experiencing diminution in value and lost equity. The specific amount of these damages will be determined at trial, but they are reasonably and currently believed to be in excess of \$75,000, exclusive of interest and costs.

COUNT II
Breach of Express Warranty against Lebermuth
N.C. Gen. Stat. § 25-2-313 or, Alternatively, N.D. Cent. Code § 41-02-30

78. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

79. The contracts between EarthKind and Lebermuth for Lebermuth's supply of fresh cab oil were between a buyer and seller of goods.

80. An express warranty was created each time Lebermuth provided EarthKind with an invoice stating that it was supplying fresh cab oil that complied with the CSFs, as indicated by item code CC-3208-01, and a COA that described the fresh cab oil as having odor and physical characteristics that were consistent with the product described in the CSFs. *See* N.C. Gen. Stat. § 25-2-313(1)(b); N.D. Cent. Code § 41-02-30(1)(b). On the basis of these descriptions of the goods, EarthKind continued to purchase fresh cab oil from Lebermuth and to market products made with Fresh Cab® to its customers.

81. An express warranty was created each time Mr. Brown, on Lebermuth's behalf, represented in response to Ms. Warberg Block's inquiries that the fresh cab oil Lebermuth was supplying conformed to the CSFs. *See* N.C. Gen. Stat. § 25-2-313(1)(a); N.D. Cent. Code § 41-02-30(1)(a). On the basis of Mr. Brown's affirmations of fact and promises, EarthKind continued to purchase fresh cab oil from Lebermuth and to market such products to its customers.

82. Lebermuth breached these express warranties by supplying EarthKind with fresh cab oil that did not comply with the CSFs.

83. As a result of Lebermuth's breaches, EarthKind has suffered substantial damages, including without limitation losses arising from being forced to halt production of its products for ten months, having purchased non-compliant and unusable inventory, incurring regulatory costs, and experiencing diminution in value and lost equity. The specific amount of these damages will be determined at trial, but they are reasonably and currently believed to be in excess of \$75,000, exclusive of interest and costs.

COUNT III

Fraud against All Defendants

84. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

85. Defendants made false representations of material fact to EarthKind each time Mr. Brown represented to Ms. Warberg Block that the fresh cab oil Lebermuth was supplying to EarthKind conformed to the CSFs. These representations were made repeatedly by phone and in person over the period 2007-2017.

86. Lebermuth also made a false representation of material fact to EarthKind each time it provided EarthKind with an invoice stating that it was supplying fresh cab oil that complied with the CSFs, as indicated by item code CC-3208-01, and a COA that described the fresh cab oil as

having odor and physical characteristics that were consistent with the product described in the CSFs. These invoices and COAs were provided hundreds of times from 2007-2017.

87. Defendants further concealed a material fact each time by failing to inform EarthKind that the fresh cab oil it was supplying did not comply with the CSFs, and by not informing EarthKind that it had substituted ingredients in its fresh cab oil so that it did not comply with the CSFs.

88. When EarthKind began to suspect potential discrepancies in Lebermuth's formula and the CSFs, Defendants doubled-down on their fraudulent scheme and attempted to cover up Lebermuth's noncompliance in order to preserve its business with EarthKind. These fraudulent representations were independent of the parties' contractual obligations. They are described above and include (a) Mr. Brown assuring Ms. Warberg Block on an October 2016 phone call that the inaccuracies were with Lebermuth's formula documents and not the formula itself; (b) Lebermuth providing EarthKind with new, knowingly inaccurate formula documents in March and April 2017; (c) Mr. Davis informing Dr. Kintz-Early during their April 26, 2017 meeting that his email contained the correct formula for the fresh cab oil that Lebermuth currently was manufacturing and that it complied with the CSFs; and (d) Mr. Brown again assuring Ms. Warberg Block on a phone call on or about April 26, 2017, that the formula being used by Lebermuth complied with the CSFs.

89. Defendants' false representations and concealment of material facts described above were reasonably calculated to deceive EarthKind and made with the intent to deceive EarthKind.

90. Defendants' false representations and concealment of material facts described above did in fact deceive EarthKind, which relied on the misrepresentations in continuing to

purchase fresh cab oil from Lebermuth and to market products made with Fresh Cab® to its customers.

91. Defendants' false representations and concealment of material facts were willful, fraudulent, malicious, and oppressive.

92. Defendants' false representations and concealment of material facts caused substantial damages to EarthKind, including without limitation losses arising from being forced to halt production of its products for ten months, having purchased non-compliant and unusable inventory, incurring regulatory costs, and experiencing diminution in value and lost equity. The specific amount of these damages will be determined at trial, but they are reasonably and currently believed to be in excess of \$75,000, exclusive of interest and costs.

COUNT IV
Negligent Misrepresentation against all Defendants
(Asserted In the Alternative)

93. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

94. Defendants made false representations of material fact to EarthKind each time Mr. Brown represented to Ms. Warberg Block that the fresh cab oil Lebermuth was supplying to EarthKind conformed to the CSFs.

95. Lebermuth also made a false representation of material fact to EarthKind each time it provided EarthKind with an invoice stating that it was supplying fresh cab oil that complied with the CSFs, as indicated by item code CC-3208-01, and a COA that described the fresh cab oil as having odor and physical characteristics that were consistent with the product described in the CSFs.

96. Defendants made further false representations to EarthKind after EarthKind began to inquire regarding potential discrepancies in Lebermuth's formula and the CSFs. These

misrepresentations were independent of the parties' contractual obligations. They are described above and include (a) Mr. Brown assuring Ms. Warberg Block on an October 2016 phone call that the inaccuracies were with Lebermuth's formula documents and not the formula itself; (b) Lebermuth providing EarthKind with new, knowingly inaccurate formula documents in March and April 2017; (c) Mr. Davis informing Dr. Kintz-Early during their April 26, 2017 meeting that his email contained the correct formula for the fresh cab oil that Lebermuth currently was manufacturing and that it complied with the CSFs; and (d) Mr. Brown again assuring Ms. Warberg Block on a phone call on or about April 26, 2017, that the formula being used by Lebermuth complied with the CSFs.

97. Defendants' misrepresentations described above were not warranted by the information in Defendants' possession.

98. Defendants had a duty to exercise reasonable care or competence in communicating information for EarthKind's guidance in connection with Lebermuth's supply of fresh cab oil, and Defendants breached their duty of care.

99. At the time when the false representations were made, EarthKind had no knowledge of the falsity of the representations, and EarthKind reasonably relied upon the false or incomplete representations in continuing to purchase fresh cab oil from Lebermuth and to market products made with Fresh Cab® to its customers.

100. As a direct and proximate cause of Defendants' negligent misrepresentations, EarthKind has suffered substantial damages, including without limitation losses arising from being forced to halt production of its products for ten months, having purchased non-compliant and unusable inventory, incurring regulatory costs, and experiencing diminution in value and lost

equity. The specific amount of these damages will be determined at trial, but they are reasonably and currently believed to be in excess of \$75,000, exclusive of interest and costs.

COUNT V
Unfair and Deceptive Trade Practices or, Alternatively,
Unlawful Sales or Advertising Practices against All Defendants
N.C. Gen. Stat. § 75-1.1 or, Alternatively, N.D. Cent. Code § 51-15-02

101. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

102. Defendants' actions, as described above, constitute unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 or, alternatively, unlawful sales or advertising practices under N.D. Cent. Code § 51-15-02.

103. Over the course of a decade, Lebermuth provided fresh cab oil to EarthKind that Lebermuth knew did not comply with the CSFs, and Defendants willfully misrepresented that fact to and concealed that fact from EarthKind by repeatedly assuring EarthKind's CEO that the fresh cab oil complied with the CSFs and by providing EarthKind with willfully false invoices and COAs. Defendants made these false representations with the intent to deceive EarthKind into continuing to purchase fresh cab oil so that Lebermuth could keep EarthKind's lucrative business without having to incur the expense of conforming its formula to the CSFs.

104. When EarthKind began to suspect potential discrepancies in Lebermuth's formula and the CSFs, Defendants continued their deception and attempted to cover up Lebermuth's noncompliance in order to preserve Lebermuth's business with EarthKind. Defendants' deceptive actions are described above and include (a) Mr. Brown assuring Ms. Warberg Block on an October 2016 phone call that the inaccuracies were with Lebermuth's formula documents and not the formula itself; (b) Lebermuth providing EarthKind with new, knowingly inaccurate formula documents in March and April 2017; (c) Mr. Davis informing Dr. Kintz-Early during their April 26, 2017 meeting that his email contained the correct formula for the fresh cab oil that Lebermuth

currently was manufacturing and that it complied with the CSFs; and (d) Mr. Brown again assuring Ms. Warberg Block on a phone call on or about April 26, 2017, that the formula being used by Lebermuth complied with the CSFs.

105. Defendants' conduct was in or affecting commerce under N.C. Gen. Stat. § 75-1.1 or, alternatively, in connection with the sale of merchandise under N.D. Cent. Code § 51-15-02.

106. Defendants' conduct was unfair, deceptive, unethical, unscrupulous, and substantially injurious to EarthKind.

107. As a direct and proximate result of Defendants' conduct, EarthKind has suffered substantial damages in both North Carolina and North Dakota, including without limitation losses arising from being forced to halt production of its products for ten months, having purchased non-compliant and unusable inventory, incurring regulatory costs, and experiencing diminution in value and lost equity. The specific amount of these damages will be determined at trial, but they are reasonably and currently believed to be in excess of \$75,000, exclusive of interest and costs.

108. Pursuant to N.C. Gen. Stat. § 75-16 and N.C. Gen. Stat. § 75-16.1 or, alternatively, N.D. Cent. Code § 51-15-09, EarthKind is entitled to treble damages and attorneys' fees for Defendants' conduct.

PRAYER FOR RELIEF

WHEREFORE, EarthKind requests that:

1. The Court enter judgment against Defendants for EarthKind's claims in an amount to be proven at trial but reasonably and currently believed to be in excess of \$75,000, exclusive of interest and costs.

2. The Court award EarthKind treble damages pursuant to N.C. Gen. Stat. § 75-16 or, alternatively, N.D. Cent. Code § 51-15-09;

3. The Court award EarthKind punitive damages;
4. The Court award EarthKind its costs and expenses, including attorneys' fees, pursuant to N.C. Gen. Stat. § 75-16.1 or, alternatively, N.D. Cent. Code § 51-15-09; and
5. The Court award EarthKind such other and further relief as it deems just and proper.

Dated this the 2nd day of May, 2019.

Respectfully submitted,

By: /s/ Scott M. Tyler
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